

Singh (Migration) [2023] AATA 1299 (23 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Nishan Singh
REPRESENTATIVE:	Mr John Young (MARN: 9251554)
CASE NUMBER:	2112415
HOME AFFAIRS REFERENCE(S):	BCC2016/2694450 BCC20162694450
MEMBER:	Michael Cooke
DATE:	23 January 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations

Statement made on 23 January 2023 at 1:08pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Federal Circuit Court remittal – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 15 August 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because [insert brief details of delegate's findings].
5. The matter is before the Tribunal because of a Court order remitting the matter to the Tribunal for reconsideration.
6. The applicant was represented in relation to the review.
7. The applicant's representative has tendered, subsequently, a comprehensive submission pursuant to reg.1.15A(3) of the Regulations.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant can meet the criteria for the visa sought.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

13. Findings and reasons about each matter in reg 1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under reg 1.15A(2), i.e.

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
14. The Tribunal has taken note of the additional information submitted and finds that the parties have displayed joint ownership of assets and joint liabilities sharing of day-to-day household expenses. They have outlined their joint pooling of financial resources and joint legal obligations.
15. The Tribunal finds that the financial aspects of the relationship are spousal in nature.
- Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
16. The parties have evidenced that they care for the sponsor's son and their own child. They have bought a property together and share the housework and are both involved in the applicant's business.
- Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
17. The Tribunal has received copious information concerning the social aspects of the relationship and is satisfied the relationship is spousal in nature. This includes photographic evidence of acceptance of the parties' relationship by both families and mutual friends.
- Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
18. The information before the Tribunal indicates that the parties' share a deep commitment to each other and have had a child together. This indicates the degree of companionship and emotional support they draw from each other as the applicant has also evidenced his close relationship with his stepson. They work together in the applicant's business and see their relationship of 6 years as long-term.
- Any other circumstances of the relationship.
19. None.
20. The Tribunal has considered the full circumstances of the relationship and makes the following findings on these matters against s 5F(2)(b)-(d). The parties have a mutual

commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and the live together and not separately and apart on a permanent basis.

21. On the basis of the above the Tribunal **is** satisfied that the requirements of s 5F(2) are met at **the time the visa application was made and the time of this decision.**
22. Therefore, the applicant meets cl.820.211(2)(a) and cl.820.221(1)(a).
23. Before concluding the time of decision criterion (cl, 820.221) is met, the Tribunal makes the following findings:
 - that the additional time of application sub-criteria are met (e.g. for cl, 820.211(2), make findings on the sponsorship (cl, 820.211(2)(c)),
 - the substantive visa holder/Schedule 3 requirements are met (cl, 820.211(2)(d)))
 - and the additional time of decision sub-criteria for sponsorship are met (cl. 820.221(4)).
24. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

25. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl. 820.211 of Schedule 2 to the Regulations
 - cl. 820.221 of Schedule 2 to the Regulations

Michael Cooke
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).